Paganelli Sdn Bhd v Care-Me Direct Sales Sdn Bhd

HIGH COURT (IPOH) — COMPANIES WINDING-UP NO 28–42 OF 1997
CLEMENT SKINNER JC
12 MARCH 1999

Civil Procedure *— Stay of striking out of winding-up petition — Pending appeal — Whether there were special circumstances — Whether appeal would become nugatory if order to stay not given — Whether petitioner aided by Companies Act 1965, ss 219(2) & 224*

Civil Procedure *— Stay of execution of judgment — Taxation of costs — Decision to award costs to respondent obtained at interlocutory proceeding — Absence of order that costs be paid forthwith — Whether costs should be dealt with at conclusion of proceedings — Rules of the High Court 1980, O 59 r 4(1)*

Companies and Corporations *— Winding up — Stay of striking out of winding-up petition — Pending appeal — Whether there were special circumstances — Whether appeal would become nugatory if order to stay not given — Whether petitioner aided by Companies Act 1965, ss 219(2) & 224*

The petitioner had presented a petition pursuant to s 218(1)(e) of the Companies Act 1965 ('the Act') for the winding-up of the respondent company. The petition was later struck out upon a motion moved by the respondent. Being dissatisfied with the decision, the petitioner filed an application seeking leave from the Court of Appeal to appeal. Pending this, the petitioner applied for a stay of the striking-out order as well as a stay of the taxation of the respondent's costs on the grounds that the judge, in striking out the winding-up petition, had misdirected himself on the facts, failed to consider relevant matters and his decision cannot be supported on the evidence. It was also alleged that if a stay was not granted to the petitioner, it would render its appeal nugatory should it be successful. Further, the stay was sought so that creditors of the respondents would not be preferred one over the other and the assets of the respondent would not be dissipated.

Held:

(1) Allegations of error by the judge in striking out the winding-up petition, even if well founded, did not entitle the petitioner to a stay because the matters complained of did not constitute special circumstances (see p 468G–H); *Monk v Bartram* [1891] 1 QB 346 followed.

(2) The argument that a stay of striking-out petition should be granted on the ground that a successful appeal would be rendered nugatory was also rejected as the petitioner's belief that such appeal would be rendered nugatory were unfounded (see p 469B–C).

(3) The petitioner's prayer for the protection of ss 219(2) and 224 of the Act was rejected as the questions of preferring one creditor over another, and the dissipation of assets, did not come into consideration since under the current position, there was no petition against the respondent (see p 470C–E).

(4) As the decision to award costs to the respondent was obtained at an interlocutory proceeding, in the absence of any order that such costs be paid forthwith, the general rule of interlocutory proceedings that costs should be dealt with at the conclusion of proceedings, would be followed (see p 471I–472A); *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* followed.

[Bahasa Malaysia summary

Pempetisyen telah menyampaikan satu petisyen di bawah s 218(1)(e) Akta Syarikat 1965 ('Akta tersebut') untuk menggulungkan syarikat responden. Kemudian petisyen tersebut dibatalkan atas usul yang dibawa oleh responden. Oleh kerana tidak puas hati dengan keputusan tersebut, pempetisyen telah memfailkan permohonan untuk memohon kebenaran daripada Mahkamah Rayuan untuk merayu. Sementara itu, pempetisyen telah memohon untuk pergantungan perintah pembatalan dan juga pergantungan penaksiran bagi kos responden atas dasar bahawa hakim, dalam membatalkan petisyen penggulungan, telah salah arah dari segi fakta dan gagal untuk mempertimbangkan perkara-perkara relevan dan keputusannya tidak boleh disokong oleh keterangan. Adalah juga dikatakan bahawa jika pergantungan tidak diberikan kepada pempetisyen, ia akan menyebabkan rayuan tersebut tidak berguna jika ia berjaya. Selanjutnya, pergantungan juga dipohon agar para pemiutang responden tidak akan mendapat keutamaan satu dari yang lain dan supaya aset-aset responden tidak akan dilupuskan.

Diputuskan:

(1) Pengataan kesilapan oleh hakim dalam membatalkan petisyen penggulungan, walaupun ia mempunyai dasar yang baik, tidak akan menyebabkan pempetisyen berhak untuk suatu pergantungan kerana perkara yang diadukan tidak terjumlah kepada keadaan-keadaan khas (lihat ms 468G–H); *Monk v Bartram* [1891] 1 QB 346 diikuti.

(2) Hujahan bahawa suatu pergantungan petisyen pembatalan patut diberikan atas dasar bahawa suatu rayuan yang berjaya akan menjadi tidak berguna juga ditolak kerana kepercayaan pempetisyen bahawa rayuan akan menjadi tidak berguna adalah tidak berasas (lihat ms 469B–C).

(3) Permohoanan pempetisyen untuk perlindungan ss 298(2) dan 224 Akta tersebut juga ditolak kerana persoalan-persoalan keutamaan satu pemiutang dari yang lain, dan juga pelupusan

aset-aset, tidak akan dipertimbangkan memandangkan pada kedudukan semasa, tidak terdapat petisyen terhadap responden (lihat ms 470C–E).

(4) Oleh kerana keputusan untuk mengaward kos kepada responden telah diperolehi pada peringkat prosiding interlokutori, dalam ketiadaan perintah supaya kos ini dibayar secara terus, peraturan am bahawa kos prosiding interlokutori akan diurus pada akhir prosiding, akan diikut.(lihat ms 471I–472A); *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* diikut.

Notes

For cases on stay of execution of judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4252–4271.

For cases on winding up generally, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Hai Yue Hin v Public Feed mill (M) Sdn Bhd [1997] 3 MLJ 730 (folld)
Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119 (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1975] 2 MLJ 105 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 (refd)
Kredin Sdn Bhd v Development & Commercial Bank Bhd [1995] 3 MLJ 304 (refd)
Monk Bartram [1891] 1 QB 346 (folld)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)

Legislation referred to

Companies Act 1965 ss 218(1)(e), 219(2), 223, 224
Courts of Judicature Act 1964 ss 43, 73
Evidence Act 1950 s 114(g)
Rules of the Court of Appeal 1994 r 13
Rules of the High Court 1980 O 59 r 4(1), O 14

Alex Chang Huey Wah (*Lim Swee Kim* with him) (*Alex Chang & Co*) for the petitioners.

David Chai (*Serena Wan Yuet Sinn* with him) (*Serena YS Wan & Co*) for the respondents.

Clement Skinner J: On 8 November 1997, Paganelli Sdn Bhd ('the petitioner') presented a petition, pursuant to s 218(1)(e) Companies Act 1965, for the winding-up of Care-Me Direct Sales Sdn Bhd ('the respondent') on the ground that the respondent was unable to pay its debts. By a letter dated 16 September 1997, the petitioner had sent a notice to the respondent demanding payment of a sum of RM25,717 within three weeks

A from receipt of the said notice. When this demand went unanswered, the petitioner filed the winding-up petition.

Upon being served the petition, the respondent filed a motion to strike it out. The court was duly moved on 18 March 1998 and on 19 March 1998 struck out the petition with costs. The learned judge found, inter alia, that
B the debt allegedly due to the petitioner was genuinely disputed on substantial grounds.

Being dissatisfied with the above decision the petitioner on 17 April 1998 filed an application seeking leave to appeal from the Court of Appeal. Pending the hearing of its application, the petitioner is applying for a stay of the order striking out the winding-up petition, as well as a stay of the
C taxation of the respondent's costs.

Section 73 of the Courts of Judicature Act 1964 ('the Act') expressly states that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders. Rule 13 of the Rules of the Court of Appeal 1994
D mirrors the provisions of s 73 of the Act whilst s 43 of the Act provides that whenever an application may be made either to the High Court or to the Court of Appeal, the application should be first made to the High Court.

The court appealed from is thus vested with a discretion to order a stay but like any other judicial discretion, it is to be exercised in accordance with
E well settled principles.

Those principles have almost without exception required an applicant to show special circumstances to warrant the grant of a stay (see *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131; *Kerajaan Malaysia v Jasanusu Sdn Bhd* [1975] 2 MLJ 105; *Kerajaan Malaysia v Dato' Hj Ghani Gilong*
F [1995] 2 MLJ 119). The Court of Appeal has however in recent times advocated a more practical, flexible and less stringent approach with the primary object of ensuring that an appeal, if successful, will not be rendered nugatory. This is how his Lordship Gopal Sri Ram JCA speaking for the court in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 expressed it at p 610:
G

> In my judgment, the paramount consideration governing an application for a stay, whether of execution or of proceedings, or, in the case of an application for some other form of interim preservation of the subject matter of an appeal, such as the grant of an injunction or other appropriate relief under s 44(1) of the Courts of Judicature Act 1964, is that the appeal to this court, if successful,
> H should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then, it should normally direct a stay or grant other appropriate interim relief that has the effect of maintaining the status quo.

Reading the decision of the Federal Court in the cases of *Dato' Hj Ghani*
I *Gilong and Jasanusa Sdn Bhd*, and that of the Court of Appeal in *See Teow Guan*, it seems to me that the approach I should take in considering this

application is to see if the applicant can either show special circumstance or demonstrate that an appeal if successful would be rendered nugatory. A

What are the factors then that the petitioner is relying upon as entitling them to a stay?

Mr Alex Chang, learned counsel for the petitioner began by saying that the decision of the learned judge shows ex-facie error in findings of fact. Counsel went to some length to identify several areas where the learned judge allegedly erred. In particular it is said that: B

(a) the learned judge was confused between facts going to show that the petition had not been properly served and facts tending to show a dispute of the debt; C

(b) the finding by the learned judge that there is fraud or near fraud on the part of the respondent in presenting this petition cannot be supported as the respondent had not raised this complaint in their affidavits or in submissions;

(c) the learned judge failed to take into account the conduct of the respondent which the petitioner alleges was not forthright. An example of this is the refusal of the respondent to confirm, when requested to, whether or not it possessed a valid licence issued by the Ministry of Trade to undertake it direct sales business. The petitioner says such refusal should have attracted an adverse inference being drawn against the respondent pursuant to s 114(g) Evidence Act. Another example is the allegedly untruthful denial by the respondent of the debt when earlier on, the respondent had acknowledged that part of the same debt amounting to RM15,519.88 was owing to the petitioner for purposes of the preparation of the petitioner's audited accounts. Yet another example is the respondents' claim that there is no debt due because there has been a contra of the RM25,712.81 through a company called Lienn Fashion Accessories Sdn Bhd when no such contra had been agreed to by the parties concerned; D E F

(d) the learned judge had erred in disallowing the petitioner's application to cross-examine the deponents of the affidavits which has resulted in unfairness to the petitioner. G

I do not think it would be an unfair summary of the petitioner's position if I said it is its complaint that the learned judge had misdirected himself on the facts, failed to consider relevant matters and his decision cannot be supported on the evidence. H

Even if these complaints are well founded, they would not entitle the petitioner to a stay because such matters do not constitute special circumstances. In *Monk v Bartram* [1891] 1 QB 346, Lord Esher MR said:

> ... It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the court will grant a stay of execution. ... I

A Notwithstanding that the allegations of error do not constitute special circumstances, adopting the more flexible approach I should nevertheless consider them as demonstrating an arguable case on appeal and regard such prospect as one of the factors I should take into account in deciding whether an appeal if successful would be rendered nugatory.

B It was next submitted by learned counsel for the petitioner that if a stay was not granted, and the petitioner is successfully in their appeal, such success would be rendered nugatory as the assets of the respondent may be dissipated leaving the petitioner with a company that is nothing but a shell to look to for recovery of its debt. I must say I find this submission to be factually incorrect. The petition was struck out on an interlocutory C application and not after a full hearing. If the petitioner is successful in its appeal, this does not result in the respondent being wound-up. All that happens is that the petition is reinstated to be heard and at the end of the day there may or may not be a winding-up ordered. Therefore, to suggest that on the facts of this case, an appeal if successful would be rendered nugatory is a fallacy.

D I also find that the petitioner's argument that its appeal will be rendered nugatory if successful is grounded on its belief or suspicion that the direct sales licence of the respondent had been cancelled by the government in which event the respondent having no other source of income would be forced to dispose of its assets and to close down. However, the petitioner E has been aware since about 30 September 1998 that there is no longer any basis for its belief or suspicion as the respondent has filed in this court a copy of its current direct sales licence valid from 1 September 1998 to 31 August 1999. The respondent is a going concern and very much in operation at the moment as clearly stated in the affidavit of Fong Kai Chuan filed on 11 September 1998 in these proceedings. I therefore find no merit F in this argument.

The wind having been taken from its sail, the petitioner has had to look to other reasons to sustain their quest for a stay. Although not raised in its application or affidavit in support of it, learned counsel for the petitioner has sought to pray in aid the protection of ss 219(2) and 224 Companies Act G 1965. Counsel drew my attention to the fact that after the petition had been presented, the respondent paid out money to one of its creditors identified as Art Studio and which payment is disclosed in encl 19. Learned counsel submits that in making such payment, the respondent has shown undue preference to Art Studio over other unsecured creditors such as the petitioner wherefore a stay should be granted so that the assets of the H respondent are preserved for pari-pasu distribution to all the unsecured creditors as intended by Parliament in enacting ss 219 and 224, which intention is confirmed by the Court of Appeal decision in *Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304.

In my judgment, the preservation of assets argument does not advance I the case of the petitioner for a stay because the protection afforded to unsecured creditors by ss 219 and 224 only becomes available where a winding-up petition has been presented against a company and continues to remain in place.

It is important not to overlook the fact that in the *Kredin* case, the petition to wind-up the company had been presented and was still in place against the company when the respondent bank registered a prohibitory order against five pieces of land belonging to the company to execute a judgment it had obtained. It is thus my view that the following passage in the judgment of Siti Norma Yaakob JCA at p 309 must be viewed in the context of a petition being in position against the company:

> Thus s 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding up to the date when the order for winding up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors. ...

In the application before me, the position that attains at this time when a stay is sought is that there is no petition against the respondent and therefore the question of preferring one creditor over another does not come into consideration and neither does the question of dissipation of assets. It is evident to me that what the petitioner seeks to achieve by obtaining a stay is to be able to take advantage of ss 219(2) and 224 to preserve the assets of the respondent so that in the event the petitioner is finally successful, it will be in a better position to recover its alleged debt. To me, ss 219 and 224 were not enacted to be employed in the manner sought to by the petitioner and neither should a court allow them to be so used.

Quite apart from the above, there are other factors that need to be seriously addressed when considering the petitioners' application for a stay. I cannot ignore the consequences that would follow from the grant of a stay. Its immediate result would be that the winding-up petition remains insitu against the respondent. To me, the presentation of a winding-up petition against a company is a most serious matter bringing with it some very real restrictions on what a company may or may not do. For example, any disposition of its property, transfer of its shares or alteration in status of its members are void unless sanctioned by court (s 223). Banks will also not generally make payments out of the company's account. There will be a general reluctance for anyone to deal with the company. The respondent, as a going concern, will not be immune from the difficulties described above if a stay is ordered leading to the respondent being prevented from effectively going about its normal business unless it applies to court for validation orders under s 223 of the Companies Act 1965. The respondent in fact already complains that if a stay is granted, its bank accounts would have to be frozen again. The petitioner on the other hand says that since the respondent can apply for validation orders there should be no impediment to granting a stay.

To me, when the competing interest of the petitioner and respondent are weighed, I have no doubt that the balance lies firmly in favour of the respondent for the reasons already adverted to earlier and that the respondent should not have to suffer a petition of winding up a day longer than necessary and neither should they have reimposed upon them the

A uncertainty and hardship which a reinstatement of the winding-up petition will bring.

Having balanced all the factors I have discussed above, I find the justice of this case does not call for the grant of a stay of the order for striking out and refuse it.

B With regard to the application for a stay of the taxation of costs awarded to the respondent, the petitioners are on firmer ground here. The respondent has taken steps to have its costs taxed and has persisted with it despite a request from the petitioner that it should await the outcome of the appeal.

C The respondent contends that as the order made was a final one, it is entitled to proceed to tax and have its costs paid. I do not agree. Whilst the decision to strike the petition out may be said to decide the rights of the parties with some finality, yet it was obtained upon an interlocutory application. As the petitioner is now seeking leave to appeal, proceedings between the petitioner and the respondent have not concluded yet.

D Order 59 r 4(1) Rules of the High Court 1980 states:

> Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of costs may, if the Court think fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

E It is quite clear from a reading of the above rule that whilst a court may deal with the question of costs at any stage of the proceedings, if a party becomes entitled to be paid costs when the proceedings have not concluded yet, that party would not be entitled to be paid its cost forthwith unless the court so orders.

F In the case of *Hai Yue Hin v Public Feedmill (M) Sdn Bhd* [1997] 3 MLJ 730, the Court of Appeal had occasion to consider the provisions of O 59 r 4(1) in relation to costs awarded in interlocutory proceedings in the form of an O 14 application. Shaik Daud JCA speaking for the court said at p 733:

G
> On reading of O 59 r 4(1), we find that the intention of this rule is as clear as day. The rule itself indicates that the question of costs is left to the discretion of the court and also provides that the court 'may, if the court thinks fit require the costs to be paid forthwith'. Surely these words must mean what they say. If the court thinks it fit, the court itself would order the costs to be paid forthwith and in the absence of such an order, it should follow the general rule
H of interlocutory proceeding, and the costs should only be paid after the conclusion of the proceedings. ...

The order of 19 March 1998 in so far as costs are concerned is in the following terms:

> It is also hereby ordered the costs of this application including incidental costs
I relating to this petition be borne by the petitioner.

There was no request that the above costs be paid forthwith and neither has an order been made by the learned judge that costs be paid forthwith. In the absence of any such order, the costs awarded to the respondent should

follow the general rule of interlocutory proceedings and be dealt with at the conclusion of proceedings. I accordingly stay all further proceedings on the award of costs to the respondent.

As regards costs of this application, I will hear the parties on the appropriate order I should make. The deputy registrar is to fix an appropriate date.

Order accordingly.

Reported by Joel Ng